

Geri N. Kahn (CSB #148536)
400 Montgomery Street, Suite 810
San Francisco, CA 94104
Tel. (415) 397-5446
Fax (925) 889-4379
Email: gkahn@pacbell.net

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

Margaret KERR,) Case No.: 075116 WDB
Plaintiff,) PLAINTIFF'S COMPLAINT FOR WRIT
vs.) IN THE NATURE OF MANDAMUS
Michael Chertoff, Secretary, Department of)
Homeland Security; Emilio T. Gonzalez,)
Director, United States Citizenship and)
Immigration Services; Peter T. Keisler,)
Acting Attorney General; Rosemary)
Melville, District Director, United States)
Citizenship and Immigration Services; and)
Robert Mueller, Director of Federal Bureau)
of Investigation.)
Defendants.)

Plaintiff, Margaret Kerr, by and through her undersigned attorney, sues Defendants and states as follows:

1. This action is brought against the Defendants to compel action on her application for lawful permanent resident status properly filed by the Plaintiff. The application was filed and remains within the jurisdiction of the Defendants, who have improperly withheld action on this application to Plaintiff's detriment.

PARTIES

2. Plaintiff MARGARET KERR (A96 391 101) is a native and citizen of Canada. She filed an Application to Register Permanent Resident or Adjust Status (Form I-485) on September 11, 2003 and is seeking to become a lawful permanent resident based on an approved I-130 Petition for Alien Relative, filed by her husband, Don Cano.

3. Defendant Michael Chertoff is the Secretary of the Department of Homeland Security (hereinafter “DHS”), and this action is brought against him in his official capacity. He is generally charged with enforcement of the Immigration and Nationality Act, and is further authorized to delegate such powers and authority to subordinate employees of the DHS. 8 U.S.C, §1103(a); 8 C.F.R. §2.1. Mr. Chertoff is sued here in his official capacity.

4. Peter T. Keisler is the Acting Attorney General of the Department of Justice, and such, is head of the United States Department of Justice and the chief law enforcement officer of the federal government. The Attorney General is also ultimately responsible for the Federal Bureau of Investigation, a subdivision of the Justice Department. This action is brought against him in his official capacity.

5. Emilio T. Gonzalez is the Director of the United States Citizenship and Immigration Services (hereinafter “USCIS”), an agency within the DHS to whom the Secretary’s authority has in part been delegated and is subject to the Secretary’s supervision. Defendant Director is generally charged with the overall administration of benefits and immigration services. 8 C.F. R. §100.2(a). Mr. Gonzalez is sued here in his official capacity.

6. Defendant Rosemary Melville, District Director, is an official of the USCIS generally charged with supervisory authority over all operations of the USCIS within her district with certain specific exceptions not relevant here. 8 C.F.R. §100.2(d)(2)(ii). As will be shown, Defendant Director is the official with whom Plaintiff’s

1 Application for Adjustment of Status remain pending. She is sued here in her official
2 capacity.

3 7. Defendant Robert S. Mueller, III, is Director of the Federal Bureau of Investigations
4 (FBI), the law enforcement agency that conducts security clearances for other U.S.
5 government agencies, such as the Department of Homeland Security. As it will be
6 shown, Defendant has failed to complete the security clearances on Plaintiff's case
7 hence causing delay in Plaintiff's Application for Adjustment of Status.

9 JURISDICTION

10 8. Jurisdiction is proper in this court, pursuant to 28 USC §1331 and 1361, 5 USC §701
11 *et seq.*, and 28 USC §2201 *et seq.* Relief is requested pursuant to these statutes.

12 VENUE

13 9. Venue is proper in this court, pursuant to 28 USC §1391(e), in that this is an action
14 against officers and agencies of the United States in their official capacities, brought
15 in the District where the Plaintiff resides if no real property is involved in the action.
16 Specifically, Plaintiff resides at 1546 Waller Street, San Francisco, CA 94117, and no
17 real property is involved in the instant action.

18 EXHAUSTION OF REMEDIES

19 10. Plaintiff has exhausted her administrative remedies.

20 CAUSE OF ACTION

21 11. Plaintiff and her U.S. Citizen husband, Don Cano, filed their application to Register
22 Permanent Resident status (Form I-485) and Petition for Alien Relative (Form I-130)
23 with Citizenship and Immigration Services based on their marriage on September 11,
24 2003. They were interviewed on May 11, 2004 at the San Francisco district office.
25 The adjudicator approved the I-130 on that day but indicated that the background
26 checks were pending and that they needed a copy of Ms. Kerr's birth certificate. (See
27 **Exhibit 1, copies of receipt notice for I-485, copy of I-130 approval.**) Ms. Kerr
28 submitted her birth certificate to USCIS on July 23, 2004.

12. On January 31, 2005, Plaintiff went to the San Francisco district USCIS to inquire
1 about her case. She was informed that it was still pending due to a security clearance.
2 On March 16, 2005, she received a written confirmation stating the same. (**Exhibit 2,**
3 **copy of letter from USCIS, March 16, 2005.**)

13. On November 18, 2005, Plaintiff received a request from CIS to have her biometrics
6 taken. She did so on December 2, 2005.

14. In a letter dated February 22, 2006, CIS asked Ms. Kerr to take her fingerprints again
8 on March 1, 2006. She did so. (**Exhibit 3, copy of letter from USCIS, February**
9 **22, 2006.**)

15. In December 2006, Plaintiff sent a Freedom of Information Act Request (“FOIA”) to
11 the FBI. She received a response indicating that no records were found pertaining to
12 her. (**See Exhibit 4, letter from the FBI dated January 11, 2007.**)

16. On June 28, 2007, Plaintiff’s counsel wrote a letter to Rosemary Melville inquiring
14 into the status of this case and informing her that if no response were received within
15 two weeks, Ms Kerr would file this action. Counsel received a standard response that
16 Plaintiff’s case was still pending due to name checks. (**See Exhibit 5, letter from**
17 **USCIS dated July 26, 2007.**)

18. On August 2, 2007, Plaintiff went to USCIS to inquire about the status of her case.
19 She received the same response – that her case is delayed due to security checks.

20. Based on the responses from USCIS Plaintiff believes that her I-485 application has
21 not been adjudicated because of Defendant FBI’s failure to complete her name check.
22 At this time, the FBI name check appears to be the only reason for the delay of
23 Plaintiff’s I-485 application as there are no other issues. (**See Exhibit 6, copy of I-**
24 **485 processing worksheet.**)

25. Defendants’ refusal to act on this application is, as a matter of law, arbitrary and not
26 in accordance with the law. Defendants unreasonably have delayed in and have
27 refused to adjudicate Plaintiff’s application for adjustment of status for over four
28

1 years, from the date of filing, thereby depriving her of the right to a decision on her
2 application and the peace of mind to which Plaintiff is entitled.

3 20. Plaintiff has been damaged by the failure of Defendants to act in accord with their
4 duties under the law.

5 a. Plaintiff has had to apply for two subsequent renewals of her work authorization
6 at a cost of approximately \$180.00 for the first one and \$340.00 for the
7 subsequent one because her application for permanent residence has not been
8 adjudicated. Because the work authorization is only issued for a year, she has to
9 pay USCIS a fee to renew it if she wishes to work lawfully in the United States.

10 b. If Plaintiff wishes to travel outside of the United States, she must request advance
11 parole. An advance parole document costs \$305.00. She would also have to wait
12 for three months to obtain it. If she had lawful permanent residence, Plaintiff
13 would be permitted to travel back and forth to and from Canada without any cost
14 and at any time.

15 c. Plaintiff has been further damaged in that he is unable to accrue time to be
16 eligible for naturalization as a citizen of the United States, thus delaying her
17 obtainment of the rights and privileges enjoyed as citizens of the United States.
18 In fact, as she is married to a U.S. Citizen, she would be permitted to apply two
19 years and nine months after she obtained her permanent residence. It is
20 conceivable that she could have already been a United States citizen had the
21 defendants timely adjudicated her application.

22 21. The Defendants, in violation of the Administrative Procedures Act, 5 USC §701 *et*
23 *seq.*, are unlawfully withholding or unreasonably delaying action on Plaintiff's
24 adjustment application and have failed to carry out the adjudicative functions
25 delegated to them by law with regard to Plaintiff's case.

26
27
28

PRAYER

22. WHEREFORE, in view of the arguments and authority noted herein, Plaintiff respectfully prays that the Defendants be cited to appear herein and that, upon due consideration, the Court enter an order:

- a. requiring Defendants to expeditiously complete the Security Check on Plaintiff application of adjustment of status;
- b. requiring USCIS to process the adjustment application to conclusion;
- c. awarding Plaintiff reasonable attorney's fees under the Equal Access to Justice Act;
- d. granting such other relief at law and in equity as justice may require.

Dated this 4th day of October 2007

Respectfully submitted,

/s/ Geri N. Kahn

Geri N. Kahn
Attorney for Plaintiff

CERTIFICATION OF INTERESTED ENTITIES OR PERSONS

Pursuant to Civil L.R. 3-16, the undersigned certifies that as of this date, other than the named parties, there is no such interest to report.

Dated: October 4th 2007

Respectfully submitted,

/s/ Geri N. Kahn

Geri N. Kahn
Attorney for Plaintiff

1 **LIST OF ATTACHMENTS**
2
3
4

5 1. Copies of receipt notice for I-485, copy of approval notice for I-130.
6 2. Copy of letter from USCIS, March 16, 2005.
7 3. Copy of letter from USCIS, February 22, 2006.
8 4. Letter from the FBI, January 11, 2007.
9 5. Letter from USCIS, July 26, 2007.
10 6. Copy of I-485 processing worksheet.

EXHIBIT 1

U.S. Citizenship and Immigration Services

630 Sansome Street
San Francisco, CA 94111

Notice of Receipt

Date: 10/9/2003

A No: 96-391-101 / COA: CR6

Name: KERR, MARGARET
Address: 1546 WALLER STREET
SAN FRANCISCO, CA 94117

Your Form I-485 Application for Adjustment of Status has been received and accepted. Your interview appointment notice will be mailed to you separately. If you also applied for employment authorization and/or advance parole, notices for appearing to receive these benefits, if approved, are also enclosed.

Please carefully review all of the other material enclosed. It may include requests for evidence and documentation you must bring with you to your interview on the date assigned. Failure to bring all requested evidence and documents to your adjustment of status interview could result in immediate denial of your adjustment application. DO NOT mail documents to this office unless advised to do so.

NOTICE: You must not depart the United States without written permission from the Service while your application is pending. If you depart without permission your application will be denied. You may apply for advance parole to re-enter the United States to continue processing your application.

ADVISORY: If after April 1, 1997, you were unlawfully present in the United States for more than 180 days before filing for adjustment of status, you may be found inadmissible under Section 212(a)(9)(B)(I) of the Act when returning to the United States. If you are found inadmissible, you will need to qualify for a waiver of inadmissibility before your adjustment of status can be approved.

CHANGE OF ADDRESS: The change of address form included with this receipt is for your use to notify this office of any change of address. Please retain a copy for your records. Failure to notify this office in a timely manner of any change of address may result in denial of your applications for adjustment of status and employment authorization (EAD).

For: David N. Still, District Director

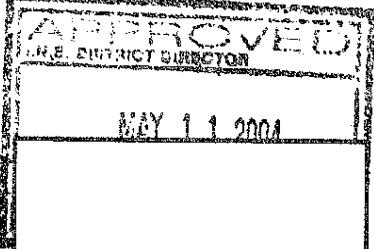
DM Form 1 (09/05/03) other editions are obsolete and may no longer be used

U.S. Department of Justice
Immigration and Naturalization Service (INS)

Petition for Alien Relative

OMB #1115-0054

DO NOT WRITE IN THIS BLOCK - FOR EXAMINING OFFICE ONLY

Case ID#	Action Stamp	Fee Stamp
AB 96391101	 MAY 11 2001	Serial 002803071 SFR-PC I-130 SPouse \$130.00
G-28 or Voing #		
Section of Law: <input checked="" type="checkbox"/> 201 (b) spouse <input type="checkbox"/> 201 (b) child <input type="checkbox"/> 201 (b) parent	<input type="checkbox"/> 203 (a)(1) <input type="checkbox"/> 203 (a)(2) <input type="checkbox"/> 203 (a)(4) <input type="checkbox"/> 203 (a)(5)	
AM CON: _____		
Remarks:		

Petition was filed on: 9/11/03 (priority date)

Personal Interview Previously Forwarded
 Pet. Ben. "A" File Reviewed Stateside Criteria
 Field Investigations I-485 Simultaneously
 204 (a)(2)(A) Resolved 204 (b) Resolved

A. Relationship

1. The alien relative is my 2. Are you related by adoption? 3. Did you gain permanent residence through adoption?
 Husband/Wife Parent Brother/Sister Child Yes No Yes No

B. Information about you

1. Name (Family name in CAPS) (First) (Middle)
CANO **DON** **ERIC**

2. Address (Number and Street) (Apartment Number)

C. Information about your alien relative

1. Name (Family name in CAPS) (First) (Middle)
KERR, MARGARET, **DOROTHY** **ZARA GOZA**

2. Address (Number and Street) (Apartment Number)
1546 WALTER ST.

(Town or City) (State/Country) (ZIP/Postal Code)
SAN FRANCISCO **CA** **94117**

3. Place of Birth (Town or City) (State/Country)

KINGSTON **CANADA**

4. Date of Birth 5. Sex 6. Marital Status
(Mo/Day/Yr) Male Married Single
 Female Widowed Divorced
11/23/1976

7. Other Names Used (including maiden name)

NA

8. Date and Place of Present Marriage (if married)

7/7/2003 SAN FRANCISCO, CA - CITY HALL

9. Social Security Number 10. Alien Registration Number (if any)

NA

NA

11. Name of Prior Husbands/Wives 12. Date(s) Marriage(s) Ended

NA

NA

13. Has your relative ever been in the U.S.?

Yes No

14. If your relative is currently in the U.S., complete the following: He or she last arrived as a (visitor, student, stowaway, without inspection, etc.)

VISITOR - (CANADIAN)

Arrival/Departure Record (I-94) Number Date arrived (Month/Day/Year)

NA **10/15/2002**

Date authorized stay expired, or will expire, as shown on Form I-94 or I-95

NA

15. Name and address of present employer (if any)

NA

Date this employment began (Month/Day/Year)

16. Has your relative ever been under immigration proceedings?

Yes No Where _____ When _____
 Exclusion Deportation Recission Judicial Proceedings

INITIAL RECEIPT	RESUBMITTED	RELOCATED	COMPLETED				
			Rec'd	Sent	Approved	Denied	Returned
					S.T.		

EXHIBIT 2

U.S. Department of Homeland Security
San Francisco, CA 94111



U.S. Citizenship
and Immigration
Services

Margaret Kerr
1546 Waller Street
San Francisco, CA 94117

A 96 391 101 (E-11)

MA 16 2007

RE: I485 application

In response to your written inquiry dated January 31, 2005, please be informed that:

File is in this office waiting to be scheduled, in approximately _____ months.

We are unable to give a definite date and time for an Interview appointment. You and your client will be notified at least two weeks in advance of your appointment date.

File has been requested and case will be reviewed and acted upon when we receive it.

File/letter forwarded to appropriate Office/Unit _____ for action, therefore, any further inquiries regarding this case should be forwarded to that Unit.

File is located in _____ and your inquiry was forwarded to them.

File is located in _____, please direct your inquiries to them.

There is no G-28 in the file indicating you as the Attorney of Record, therefore, we are unable to provide you with any Information.

You are requested to submit the following document(s):

You are granted a period of 90 days from the date of this letter to submit the requested document(s). Please return this letter with your response.

Documents in your case were requested on _____. We are currently reviewing cases in which documents were requested on _____.

Documents in your case were requested on _____. To date, no response has been received.

Our records show that your case was denied on _____. If you wish to obtain a copy of the denial, you can request it through the Freedom of Information Act (FOIA) Unit.

This office is returning your documents. We can't locate your case without an Alien Registration Number. Please return enclosed document(s) with your Alien Registration Number.

OTHER: Your application is pending completion of your security clearance.

Sincerely,
Adjustment Branch *MA*

EXHIBIT 3

U.S. Department of Homeland Security
San Francisco, CA 94111



**U.S. Citizenship
and Immigration
Services**

MARGARET KERR
1546 WALLER ST.
SAN FRANCISCO, CA 94117

File No. A 96 391 101
Date: February 22, 2006
I-485

This is in reference to your Application to Adjust your Status in the United States. You have been scheduled to be fingerprinted at the INS APPLICATION SUPPORT CENTER. 03/01/06

NOTE: If you do not have your finger prints taken, your adjustment of status application may be considered abandoned and denied pursuant to 8 CFR § 103.2(b)(13). **IMPORTANT:** If you are unable to appear on your appointment date, you should write to the ASC directly to request rescheduling.

<input type="checkbox"/> SANTA ROSA 1401 Guerneville Rd., Suite. 100 Santa Rosa, CA 95403 Hours: Tuesday through Saturday 8am to 3:30pm	<input type="checkbox"/> OAKLAND 2040 Telegraph Avenue Oakland, CA 94612 (Near 19 th Street Bart Station) Hours: Tuesday through Saturday 8am to 3:30pm
<input checked="" type="checkbox"/> SAN FRANCISCO 250 Broadway Street San Francisco, CA 94111 Hours: Tuesday through Saturday 8:00am to 3:30pm	<input type="checkbox"/> MODESTO 901 N. Carpenter Rd., Suite. 14 Modesto, CA 95351 Hours: Tuesday through Saturday 8am to 3:30pm
<input type="checkbox"/> FRESNO 4893 East Kings Canyon Fresno, CA 93727 Hours: Tuesday through Saturday 8:00am to 3:30pm	<input type="checkbox"/> SACRAMENTO 731 "K" Street, Room 100 Sacramento, CA 95816 Hours: Tuesday through Saturday 8am to 3:30pm
<input type="checkbox"/> SAN JOSE 122 Charnett Avenue San Jose, CA 95131 Hours: Tuesday through Saturday 8:00am to 3:30pm	<input type="checkbox"/> SALINAS 1954 North Main Street (Santa Rita Plaza) Salinas, CA 93906 Hours: Tuesday through Saturday 8am to 3:30pm

When you go to have your fingerprints taken, you must bring: 1) THIS NOTICE; and 2) Photo Identification such as a passport, valid driver's license, national ID, military ID, or State-issued photo ID. If you appear without proper identification, you will not be fingerprinted.

Cc:

EXHIBIT 4



U.S. Department of Justice

Federal Bureau of Investigation

Washington, D.C. 20535

January 11, 2007

MR. GERI N. KAHN
400 MONTGOMERY STREET
SUITE 810
SAN FRANCISCO, CA 94104

Request No.: 1066509-000
Subject: KERR, MARGARET

Dear Requester:

This is in response to your Freedom of Information-Privacy Acts (FOIPA) request noted above.

To promptly respond to requests, we concentrate on identifying main files in the central records system at FBI Headquarters. No records responsive to your FOIPA request were located by a search of the automate indices.

You may file an administrative appeal by writing to the Director, Office of Information and Privacy, United States Department of Justice, 1425 New York Ave., NW, Suite 11050, Washington, D.C. 20530-0001, within sixty days from the date of this letter. The envelope and the letter should be clearly marked "Freedom of Information Appeal" or "Information Appeal." Please cite the FOIPA number assigned to your request so that it may be easily identified.

Enclosed for your information is a copy of the FBI File Fact Sheet.

Sincerely yours,

David M. Hardy
Section Chief,
Record/Information
Dissemination Section
Records Management Division

Enclosure

EXHIBIT 5



Department of Homeland Security
Bureau of Citizenship & Immigration Services
San Francisco District Office
630 Sansome Street Room 200
San Francisco, CA 94111

USCIS INQUIRY RESPONSE

DATE: 7/26/2007

TO: Geri N.Kahn

File Number: A96 391 101(Margaret Kerr)

COMMENTS: Regarding Inquiry

Please note that we are still waiting for a security check on your case from the FBI. We are unable to proceed with adjudication until this is complete.

On average such cases are assigned to an officer within a week of clearance for adjudication.

Thank you.

EXHIBIT 6

I-485 Processing Worksheet, Continued

I-485 Processing Worksheet

Continued / Special Processing

A-Number:

96 391101

Continued For:

<input checked="" type="checkbox"/> Documentation	<input type="checkbox"/> Fingerprints
<input type="checkbox"/> Visa Availability	<input type="checkbox"/> Relating Files
<input type="checkbox"/> Reschedule	<input checked="" type="checkbox"/> Other

Other Comments:

Printed Cert. & FBI Name
Check

Additional Notes Attached

Interviewing Officer's Recommendation:

No other issues

Initial / Date

Appeal/Motion Filed

 AAO BIA District Office Approved Denied Remand

NTA Issued

Pending Cases

Case Transferred IN

Office:

Case Transferred OUT

Office: